RIGHTS STUFF

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Supreme Court Issues Age Discrimination Decisions

The U.S. Supreme Court recently issued rulings in two cases involving the Age Discrimination in Employment Act.

The first case involved Kentucky's retirement plan for state and county employees who occupy hazardous positions such as police officers, firefighters, paramedics and prison workers. Employees become eligible for retirement benefits in one of two ways. The first makes an employee eligible for retirement after 20 years of service. The second makes an employee eligible after five years of service if the employee reaches age 55.

Under the plan, covered workers who become disabled but are not yet eligible for normal retirement can retire at once if they have worked in the job for at least five years or if they became disabled in the line of duty. Kentucky adds a certain number of years, or imputes a certain number of years, to the employee's actual years of service to determine the level of benefits. The number of imputed years equals the number of years that the employee with a disability would have had to continue working in order to become eligible for normal retirement benefits. If an employee with 17 years of service becomes disabled at age 48, the Plan adds three years and determines the benefits as if the employee had completed 20 years of service. If an employee with 17 years of service becomes disabled at age 54, the Plan adds one year and calculates the benefits as if the employee had retired at age 55 with 18 years of service. Under the Plan, the younger employee would receive a larger pension than the older employee because the additional "imputed" years say he worked longer for his employer.

Charles Lickteig, an employee with the Jefferson County Sheriff's Department, was eligible to retire at age 55. He kept working until he turned 61. when he became disabled and retired. Under the Plan, his annual pension was calculated by multiplying his years of service (18) by 2.5% times his final annual pay. Because he became disabled after he was already eligible for retirement, no additional years were imputed to him. He sued, alleging this was age discrimination. The Equal Employment Opportunity Commission agreed with Lickteig, but the Supreme Court did not.

The Supreme Court said that the "whole purpose of the disability rules is . . . to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits. Age factors into the disability calculation only because the normal retirement rules themselves permissibly include age as a consideration." The Court said that the Age Discrimination in Employment Act requires a showing that "the discrimination at issue 'actually motivated' the employer's discrimination." The case is Kentucky Retirement Systems v. Equal Employment Opportunity Commission, 2008 WL 2445078 (US 2008).

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Fraternization Policies And Race Discrimination

Gerald Ellis, an African American man, began working for UPS as a driver in 1979. He eventually was promoted to hub supervisor, a management position. In December of 2000, he began dating a white woman who worked for UPS at its phone center. They tried to keep their relationship secret, but as is often the case in these situations, co-workers and supervisors found out about it.

In about 2003, UPS's employee relations manager, an African American woman, told Ellis's supervisor, Angela Wade, that "there were plenty of good sisters out there." Both Ellis and Wade took that to mean that the employee relations manager thought he should be dating an African American woman.

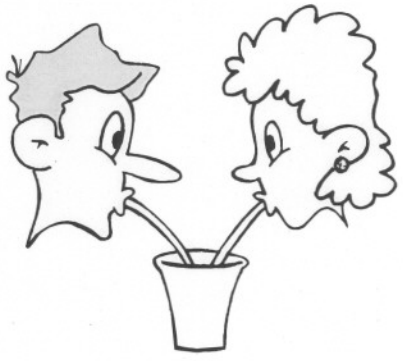
In early 2004, Ellis admitted to Wade that he was dating a white co-worker. Wade told him he was "crazy" for doing so because of UPS's non-fraternization policy. She told him that either he or his girlfriend would have to quit or he would be fired. A meeting was called at which management reminded Ellis of the policy and told him he had to "rectify the situation." He took that to mean that he had to end the relationship or someone had to resign. No one followed up to see if he had stopped dating his girlfriend.

Three days later, Ellis and his girlfriend, Glenda Greathouse, became engaged, and a year later, they were married. Ellis believed that their marriage brought them into compliance with the policy, but he never asked any supervisors if that was the case. They kept their marriage a secret for three months, when they were seen at a concert together "acting affectionately." Ellis was asked to resign, and when he refused, he was fired for violating the non-fraternization policy and for dishonesty. He sued, saying he was treated differently because of his race and because he had dated and eventually married a white woman, but lost.

Ellis told the Court that approximately twenty other couples had been involved in romantic relationships at UPS that violated the fraternization policy and all were treated better than he had been. The Court said that most of those couples reported to a different supervisor, and said that "different decision-makers may rely on different factors when deciding whether, and how severely, to discipline the employee." The only couples he could compare himself to, the Court said, were couples who reported to the same supervisor who decided to fire him. For some of the relevant couples, Ellis did not have proof of romantic relationships but only rumors. For one of the four other couples for whom Ellis had proof of a romantic relationship, Ellis had no proof that his supervisor knew of the relationship. For the second couple, the supervisor left UPS soon after he found out about the relationship, before he could take any action. For the third couple, there was evidence that the supervisor told them they had to end the relationship or one would have to resign. Ellis had no evidence that the relationship had continued. For the fourth couple, who had married, the supervisor told them that one of them had to resign, and when neither did, one was fired. The supervisor in that relationship and Ellis were treated the same - both were given an opportunity to remedy the situation and when they refused, both were fired.

The Court's conclusion was unusually romantic and deserves to be quoted in full: "By all accounts, Ellis was a good employee. He started with UPS as a driver right out of high school in 1979 and worked his way up to a managerial position. After 21 years with the company, he met a woman, apparently fell in love, and after a 4-year relationship, got engaged. A year later he got married. That's a fairly nice story, and so is the fact that Ellis and his wife were smooching at a summer concert several months after their wedding. Heck, some marriages today don't even *last* that long. Although UPS, for reasons we have stated, comes out on top in this case, love and marriage are the losers. Something just doesn't seem quite right about that."

The case is Ellis v. United Parcel Service, Inc., 523 F. 3d 823 (7th Cir. 2008. ♦



Lying On Job Applications

We often get questions about what employers should do if they find out an employee or applicant lied on his job application. Even though this question does not often present a fair employment issue in the sense of race, sex, religion, etc., discrimination, the question comes up enough that we thought it was worth an article.

In Moran v. Baxter, 193 A.D. 2d 460 (N.Y.A.D.) 1993), the Court was presented with the following situation: In 1977, Moran began working for a hospital. The job application said that "A false statement shall be grounds for not employing you, or for dismissing you after employment." Moran did not reveal on his application that he had been convicted of possessing stolen property. He said he had a high school diploma but did not. The hospital found out about the mistakes on Moran's application in 1981 but did not fire him; shortly after finding out, in fact, the hospital promoted him. Further investigation found a second conviction but still, the hospital kept Moran on the payroll. After getting promoted, Moran had to fill out a second application. Again, he lied; again, he was kept on. In 1989, an anonymous person wrote a letter to the company about Moran's lies. Another investigation followed, and this time, the hospital fired him.

He argued that given his exemplary work record, and the fact that they had retained him for years after learning of his lies, they should have not fired him. He sued. The Court said that it could not find that Moran's termination was arbitrary or capricious. The Court said that "termination is an appropriate penalty for lying about one's criminal history, qualifications, and other material facts on an application for public employment."

The case of In re Michael C. Glenville, 565 N.E. 2d 623 (Ill. 1990), also included old lies. Glenville said he began drinking when he was 14 and engaged in a series of criminal acts. He had a number of arrests and convictions. In 1978, he began working for the Cook County's assessor's office. He said on his application that he had held a job that he had never held. He didn't mention any of his arrests or convictions. In 1981, he applied for admission at IIT Chicago-Kent College of Law. Again on the application, he included a job he had never had and didn't mention the time he had worked as a bouncer at a bar. The next year, he entered the police academy and graduated first in his class.

In 1984, Glenville was on furlough from the Chicago Police Department. He had too much to drink one night with some disreputable people and ended up getting arrested for home invasion, armed robbery, residential burglary, armed violence and theft. He apparently thought, in his drunken state, that he was conducting a legitimate police investigation while he was in fact committing crimes. He was found guilty of only one charge, a misdemeanor offense of theft; the Court found that given his drinking that night, his intellectual ability was substantially reduced. He was found not to possess the required moral character to practice law and sued, saying that the bar committee should have considered whether the incident was causally related to his alcohol addiction. The Court said that the committee considered the totality of Glenville's background when it said he could not practice law, including the lies he had repeatedly told on applications over the years. The Court said that "honesty is an important factor in assessing a person's moral character." Glenville's "past misconduct cannot be lessened by his subsequent exemplary conduct." He admitted to having lied on applications to increase his chances of getting what he wanted, of being seen in the best light.

Our third case involves unemployment benefits, Miller Brewing Company v. Department of Industry, Labor and Human Relations, 308 N.W. 2d 922 (Wis. App. 1981). Richard Simmons applied for a job with Miller in 1975. He answered "No" to the question asking him if he had ever been convicted of a crime. In fact, he had three crimes on his record. He left blank the part of the form asking about his military record; he had received a dishonorable discharge. He also had applied for jobs with Miller in 1973 and 1974; those times, he was honest on his application and those times, he was not hired. But in 1975, when he lied, he got a job.

In 1977, Miller investigated Simmons for threatening a supervisor. During that investigation, Miller found out about Simmons' lies on his application and fired him. Simmons applied for unemployment compensation and was denied. The Court said "An employer who is entitled to ask a question is entitled to receive an honest answer and to rely on it."

Lessons for employers: it's fine to ask about convictions and past jobs, and it's fine to say on the application that a false answer could lead to losing the job. Be sure you treat applicants the same regardless of any protected categories they might belong to (don't, for example, run background checks only on minority applicants.) Be willing when appropriate to consider extenuating circumstances - we all sometimes deserve a second chance. ♦

Age Discrimination Decisions

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The second case is Meacham v. Knolls Atomic Power Laboratory, 2008 WL 2445078 (US 2008). Knolls needed to reduce its workforce by about thirty jobs, and scored its employees on three scales, "performance, flexibility and critical skills." Of the 31 salaried employees who were laid off after this scoring process, 30 were at least 40 years old, and they sued, alleging age discrimination. Knolls tried to argue that in determining which employees to lay off, its reliance on the scoring system was a "reasonable factor other than age," sometimes called RFOA, a defense to an age discrimination charge.

A statistical expert testified that the effect of using the scoring system was so skewed against the older employees that the results "could rarely occur by chance." The question for the Supreme Court was a fairly narrow one: which party has the burden of proving the RFOA defense? A majority of the Court said that the employer did, based on the language of the Age Discrimination in Employment Act. ♦

Mission Statement Of The BHRC

♦ Enforce the Bloomington Human Rights Ordinance

♦ Investigate complaints efficiently and professionally

♦ Educate community members about human rights

♦ Raise awareness on human rights issues

♦ Challenge barriers to equality

♦ Coordinate and channel human rights information among local groups and

♦ Empower community members to advance this mission.

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